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January 22, 2019

**VIA ELECTRONIC FILING**

Ms. Molly Dwyer, Clerk of the Court  
Office of the Clerk  
Ninth Circuit Court of Appeals  
95 Seventh Street  
P.O. Box 193939  
San Francisco, CA 94119

**Re: *NLRB v. International Ass'n of Bridge, Structural, Ornamental & Reinforcing Ironworkers Union, Local 229***  
**Case No. 17-73210**  
**Citation to Supplemental Authority Pursuant to FRAP 28(j)**  
***International Brotherhood of Electrical Workers, Local Union 357, 367 N.L.R.B. No. 61***  
**(Dec. 27, 2018)**  
**Oral Argument Scheduled for February 15, 2019**

Dear Ms. Dwyer:

Although this recently decided case involves a different section of the secondary boycott law from what is involved in the case before the Court, it is instructive with respect to the Board's refusal to consider the First Amendment's protections for communication.

The Union sent a letter to the Building Trades asking for strike sanction with a copy to a neutral employer that it was "requesting a strike sanction against [the primary employer] ... for any and all jobs because of not paying area standards." 367 N.L.R.B. No. 61, slip op. at 1 n.4.

The Board majority, with one member dissenting, found that that statement was unlawful because it did not specifically advise the neutral who received a copy of the letter that any picketing would be lawful. The Board recognized that this is contrary to decisions of this Court, as well as the D.C. Circuit. *Id.* at 2.

• Admitted in Hawaii  
•• Also admitted in Nevada  
••• Also admitted in Illinois  
•••• Also admitted in New York and Alaska  
••••• Also admitted in Florida  
••••• Also admitted in New York

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Had any other person sent the letter, including a letter directly threatening to picket the neutral,<sup>1</sup> that threat would have been protected by the First Amendment. In this case, it was only because the letter was sent by a labor organization that the Board found it unlawful.

This decision illustrates that the Board ignores the First Amendment when it applies the secondary boycott laws. The Board found the letter violated 29 U.S.C. § 158(b)(4)(ii)(B) because the neutral would not necessarily understand why it received the letter nor what it meant and therefore it would be coercive.

The Board did not address the First Amendment concerns raised and rejected this Court's precedents holding that a union need not affirmatively confirm that any picketing will be conducted in accordance with "legal limitations." *Id.* at 3.

One wonders whether a letter stating that any picketing will conform to the First Amendment would have sufficed.

Sincerely,

*/s/ David A. Rosenfeld*

David A. Rosenfeld

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cc: All Counsel (see attached)

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<sup>1</sup> There, the neutral, the Las Vegas Visitors and Convention Center, is not even an employer because it is a public entity. It is a person, however, within the scope of the secondary boycott provisions. *NLRB v. Int'l Ass'n of Ironworkers Union, Local 433*, 891 F.3d 1182 (9th Cir. 2018).

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**CERTIFICATE OF SERVICE**

I am a citizen of the United States and an employee in the County of Alameda, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 1001 Marina Village Parkway, Suite 200, Alameda, California 94501.

I hereby certify that on January 22, 2019, I electronically filed the foregoing CITATION OF SUPPLEMENTAL AUTHORITY PURSUANT TO FRAP 28(j) with the United States Court of Appeals, Ninth Circuit, by using the Court's CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the Notice of Electronic Filing by the Court's CM/ECF system.

I certify under penalty of perjury that the above is true and correct. Executed at Alameda, California, on January 22, 2019.

/s/ Karen Kempler  
Karen Kempler